Even in isolation, most of the individual parts of the reasonable doubt instructions given in this case have been condemned and discarded by the state and federal courts. As this Court noted in Taylor v. Kentucky, 436 U.S. 478 (1978), an instruction equating reasonable doubt with "'a substantial doubt, a real doubt'...though perhaps not in itself reversible error, often has been criticized as confusing." Id. at 488. Such criticisms are not new. As the Supreme Court of Tennessee observed in Frazier v. State, 117 Tenn. 430, 100 S.W. 94, 103 (1907), the words "reasonable doubt" convey

> their own unmistakable meaning, and...the cumulative effect resulting from the reiteration of the same idea by the use of such words and phrases as 'well-founded doubt,' 'substantial doubt,' and others of like meaning, is well calculated to fritter away and destroy all benefit to be derived from this important rule of law.

Since In re Winship, this view has gained substantial acceptance.[3] The basis of this trend, of course, is a recognition of the plain fact that in modifying the word "doubt," "substantial" simply does not mean the same thing as "reasonable." The same must also be said of "serious" or "strong and well-founded," all of which burdened the trial judge's definition of reasonable doubt in this case. In considering a recent non-capital case involving only the use of the word "substantial," the Supreme Court of Tennessee put the matter this way:

> We think that there is a significant difference between "reasonable doubt" and "substantial doubt." The word substantial, according to Webster's New World Dictionary (1961), means "real; actual; true; strong; solid; firm; ample; large; or of substantial value." We think that when con-

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[3]The Fifth, Sixth, Seventh and Eighth Circuits and the United States Court of Military Appeals have all held the "substantial doubt" instruction to be error. United States v. Rodriquez, 585 F.2d 1234 (5th Cir. 1978), United States v. Christy, 444 F.2d 448 (6th Cir. 1971), cert. denied, 404 U.S. 949, United States v. Wright, 542 F.2d 975 (7th Cir. 1976), cert. denied, 429 U.S. 1073, United States v. Atkins, 487 F.2d 257 (8th Cir. 1973), United States v. Cotten, 10 M.J. 260 (CMA 1981). Post-Winship state decisions rejecting or disapproving the instruction include Laird v. State, 251 Ark. 1074, 476 S.W.2d 811 (1972), State v. Harrison, 149 N.J. Super. 220, 373 A.2d 680 (A.D. 1974), State v. Thorpe, 429 A.2d 785 (R.I. 1981), Smith v. State, 547 S.W.2d 925 (Tenn. 1977), State v. McDonald, 89 Wash.2d 190, 571 P.2d 930 (1977). But see, United States v. Magnano, 543 F.2d 431 (2d Cir. 1976), cert. denied, 429 U.S. 1091, United States v. Smith, 468 F.2d 381 (3d Cir. 1972), Stirpano v. State, 287 A.2d 394 (Del. 1972), State v. Davis, 482 S.W.2d 486 (Mo. 1972).

> sideration is given to the definition and ordinary meaning of this word, there is little doubt but that its use tends to lessen the State's burden and as a natural corollary to increase the burden upon the defendant...

Smith v. State, 547 S.W.2d 925 (Tenn. 1977). A similar point was made somewhat more vividly by Justice Seiler of the Missouri Supreme Court in his concurring opinion in State v. Davis, 482 S.W.2d 486, 490 (Mo. 1972):

> 'Reasonable' and 'substantial' are not synonymous, as can be seen by referring to any of the standard dictionaries. The point was well put by counsel in argument recently where he pointed out that if one had to undergo a serious operation and were querying the doctor as to the prospects for a successful outcome, how differently the person would feel if the doctor told him there was only a reasonable chance of success as opposed to being told that there was a substantial chance of success.

Justice Seiler's hypothetical surgery patient would no doubt have gained even greater comfort from the assurance that his operation's prospects for success, far from being merely "reasonable," had now become "substantial" and also "serious" or "strong and well-founded." Not one of these words is in any respect synonymous with the word which it was used to define, and when they were employed together as in this case, the definition which resulted diluted the reasonable doubt standard far beyond that level of "utmost certainty" upon which the "moral force of the criminal law depends." In re Winship, 397 U.S. 358, 364 (1970).

The prejudicial effect of these instructions were exacerbated here by the trial judge's additional statement that a reasonable doubt is "a doubt for which you can give a reason" and "a substantial doubt...for which a person honestly seeking to find the truth can give a reason." Quite apart from its use of the word "substantial," this instruction was improper because it suggested that even if the state's proof has simply not persuaded a juror, his resulting doubt could not be regarded as "reasonable" unless he was also able to articulate a reason for it. It is for this reason that such instructions have been disapproved by the courts

of most of the jurisdictions which have considered them.[4] The reasoning behind this disapproval was forcefully set out by the Eighth Circuit in Pettine v. Territory of New Mexico, 201 F. 489 (1912):

> The ability to give sound reasons for their doubts or their beliefs is not given to many men, and every prudent and thoughtful man at once recognizes the fact that in the graver and more important affairs of his own life doubts for which he can formulate no convincing reason often induce him to act or to refuse to act. To require every person accused of crime to present such a state of evidence at his trial that every juror can give a sound reason based on the testimony for his doubt of his guilt before he may vote for his acquittal places too heavy a burden on the accused. It destroys the rule of reasonable doubt, and substitutes for a reasonable doubt a demonstrable doubt logically and conclusively sustained by the evidence or the want of it.

201 F. at 496-7.[5]

It is not petitioner's purpose to press upon this Court the question of whether each of these instructions, considered in isolation, should or should not be given in state criminal

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[4]Dunn v. Perrin, 570 F.2d 21 (1st Cir. 1978), United States v. Davis, 328 F.2d 864 (2d Cir. 1964); United States v. Harris, 346 F.2d 182 (4th Cir. 1965), Bernstein v. United States, 234 F.2d 475 (5th Cir. 1956), Pettine v. Territory of New Mexico, 201 F.2d 489 (8th Cir. 1912), State v. Taylor, 76 Idaho 358, 283 P.2d 582 (1955), Sulie v. State, 379 N.E.2d 455 (Ind. 1978), State v. Cohen, 108 Iowa 208, 78 N.W. 857 (1899), State v. Maxwell, 328 A.2d 801 (Me. 1981), Commonwealth v. Robinson, 415 N.E.2d 805 (Mass. 1981), State v. Newman, 93 Minn. 393, 101 N.W. 499 (1904), Isaacks v. State, 337 So.2d 928 (Miss. 1976), State v. Rosenburg, 118 A. 207 (N.J. 1922), Commonwealth v. Custer, 145 Pa. Super. 535, 21 A.2d 524 (1941), Owens v. Commonwealth, 186 Va. 689, 43 S.E.2d 895 (1947), State v. Keffer, 281 S.E.2d 495 (W.Va. 1981); but see, State v. Derrico, 181 Conn. 151, 434 A.2d 356 (Conn. 1980), Powers v. State, 150 Ga. App. 25, 256 S.E.2d 637 (1979), State v. Osbey, 213 Kan. 564, 517 P.2d 141 (1973), People v. Turner, 99 Mich. App. 233, 298 N.W.2d 848 (1980).

[5]Similarly, in considering an instruction that a reasonable doubt was one "which should be able to express a good and substantial reason therefore," the Virginia Supreme Court pointed out that

> [t]he language employed is susceptible of the interpretation that a juror must be able to formulate or express in words the reason for the doubt before it can be classed as reasonable. A juror may entertain a reasonable doubt as to the guilt of the accused although he may be unable to formulate or express it in words. He may be unconvinced by the evidence and yet unable "to give a good and substantial reason," or, indeed to express any reason for the result of his mental process. If such doubt be honestly entertained the juror should vote for acquittal.

Owens v. Commonwealth, 186 Va. 689, 43 S.E.2d 895, 902 (1947).

trials. He does contend, however, that the cumulative effect of the trial judge's repeated attempts to "define" the reasonable doubt standard by diluting the degree of certainty required to permit a finding for the prosecution was such as to violate the Fourteenth Amendment, and warrants review by this Court. Unlike the merely confusing reasonable doubt instructions criticized in Holland v. United States, 348 U.S. 121, 140 (1950), the instructions given here were indeed "of the type that could mislead the jury into finding no reasonable doubt when in fact there was some." No matter how much latitude the states may enjoy in the formulation of jury instructions for criminal trials, Cupp v. Naughten, 414 U.S. 141 (1973), it is obvious that where the federal constitution imposes on a state court the obligation to instruct the jury on a particular legal principle, In re Winship, 397 U.S. 358 (1970), Taylor v. Kentucky, 436 U.S. 478 (1978), Carter v. Kentucky, 450 U.S. 288 (1981), the words actually spoken to the jury must fairly convey the substance of the principle involved. There are, in other words, outer limits to the latitude of state courts in devising jury instructions concerning rights guaranteed by the Fourteenth Amendment. So far as petitioner is aware, this Court has never before had occasion to demarcate such an outer limit beyond which an instruction purporting to embody an essential federal constitutional right cannot go. Given the sharp disagreement between the Supreme Court of South Carolina and the large majority of the other state and federal courts to have considered instructions such as those at issue here, and given the gravity of the penalty imposed in this case, petitioner submits that his case provides an appropriate occasion for this Court to demarcate the constitutional outer limits of such instructions.

While a denial of so fundamental a feature of a fair trial as the protection of the reasonable doubt standard will surely require reversal of any ensuing conviction without a particularized showing of prejudice, cf. Chapman v. California, 386 U.S. 18, 23 (1967), the facts of this case provide an illustration of the potential for actual prejudice posed by the instructions

at issue here. The jury in this case was required to determine whether petitioner's testimony that he had been coerced by the police into giving a false confession actually raised a reasonable doubt of his guilt. The primary corroboration of his confession was the testimony of the alleged eyewitness Jeter, whose silence for nearly two days after the crime may have suggested a desire to hide his own guilt while he planned a way to shift the blame to someone else.[6] Apart from Jeter, the jurors were left to arrive at their verdict almost entirely on the basis of their factual determination as to whether the investigating police officers might have been lying concerning the circumstances under which the confession had been obtained. To state the issue before the jury is to admit the extent of petitioner's reliance upon the reasonable doubt standard, since it is most unlikely that any criminal defendant, much less one of petitioner's mentality and emotional condition, would ever be able to do more than raise a reasonable doubt of his guilt under such circumstances. It was thus particularly devestating to petitioner's chances for a fair trial, with his credibility pitted against that of several white police officers, for the jury to have been told that before it could acquit him of the crimes charged, it must entertain a doubt that was not merely "reasonable," but also "substantial" and "serious or strong and well-founded," and further that such substantial doubt must be one for which any juror "honestly seeking to find the truth can give a reason." Whatever doubts the jurors may otherwise have entertained were unlikely to survive this onslaught of explanation, nor did they. Under the circumstances of this case, it can fairly be said that the cumulative effect of these instructions "so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 146 (1973).

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[6] Jeter's credibility was diminished still further by his claim that he had spoken with the victim before the victim entered his home on his return from school but had failed to warn him of any impending danger, even though Jeter knew (according to his own testimony) that petitioner was waiting inside the house with a gun.

II.

THE STATE SUPREME COURT'S FAILURE TO COMPARE PETITIONER'S CASE WITH OTHER SIMILAR MURDER CASES IN WHICH THE DEATH PENALTY WAS NOT IMPOSED RAISES SUBSTANTIALLY THE SAME QUESTION AS THAT NOW BEING CONSIDERED IN PULLEY V. HARRIS.

The statutory language of South Carolina's comparative review provision is similar to the provision of Georgia's capital sentencing statute approved in Gregg v. Georgia, 428 U.S. 153 (1976). However, the South Carolina Supreme Court's construction of this statutory provision has diverged sharply from that of the Georgia Supreme Court in that the South Carolina court has consistently declined to consider as "similar cases" for purposes of review any cases in which death was not imposed. State v. Copeland, ___ S.C. ___, 300 S.E.2d 63 (1982); and see also State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981), State v. Gilbert, 277 S.C. 53, 283 S.E.2d 179 (1981), State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982). This refusal to consider cases in which the death penalty was not imposed as potentially "similar" cases for comparison contrasts with the practice of the Georgia Supreme Court, noted by the Gregg plurality, of considering such cases. Id. at 204, n.56 (opinion of Stewart, Powell, and Stevens, JJ.), Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235, 251 n.19 (1983). Such a distinction is of no small importance, for once life imprisonment cases are excluded from the pool of potentially "similar" cases, any ensuing comparative review will be tautological in nature, and wholly ill-suited to the task of determining whether the "time has come when juries generally do not impose the death sentence in a certain kind of murder case." Gregg, supra, at 206.

On appeal to the South Carolina Supreme Court, petitioner sought leave to argue that this very narrow limitation of the universe of "similar" cases, which excluded for comparative purposes all cases in which the death penalty was not imposed, rendered South Carolina's capital sentencing statute unconstitutional. See How the Federal Questions Were Raised and Decided Below, supra at 4-6. After denying petitioner's request to argue for overruling or modification of its holding in Copeland, the

South Carolina Supreme Court affirmed petitioner's death sentence on the basis of a comparative review which included only cases in which death was imposed and affirmed. State v. Adams, Opinion No. 21942 (S.C., June 29, 1983).

The conclusion of the South Carolina Supreme Court that comparative appellate review of death sentences is not required by the federal constitution is contrary to the decision of the United States Court of Appeals for the Ninth Circuit in Harris v. Pulley, 692 F.2d 1189 (1982), cert. granted ___ U.S. ___ (March 21, 1983) (No. 82-1095). The Court will decide this Term in Harris whether the Ninth Circuit correctly concluded that the proportionality review promised by the California Supreme Court in several death penalty decisions prior to Harris was constitutionally mandated. Petitioner submits that his case raises substantially the same underlying constitutional issue, because while the South Carolina Supreme Court did conduct a type of review of the proportionality of petitioner's sentence, it did so according to guidelines that virtually guaranteed that his death sentence would not be found to be disproportionate.

Petitioner does not contend that appellate comparison of similar cases is a constitutionally-required aspect of every death penalty sentencing scheme. See Jurek v. Texas, 428 U.S. 262 (1976). However, he submits that where a statutory scheme entrusts to the jury essentially unfettered discretion to impose the death penalty once a threshold finding of aggravation is made, the presence of a meaningful system of comparative appellate review remains virtually the only means of ensuring reasonable consistency and fairness in capital sentencing. Comparative appellate review, moreover, constitutes one of the key distinctions between such a statutory scheme and the purely discretionary sentencing systems condemned in Furman v. Georgia, 408 U.S. 238 (1972). Zant v. Stephens, ___ U.S. ___, 103 S.Ct 2733, 2749 (1983). South Carolina's capital sentencing system is essentially identical to Georgia's save in one critical respect: while the Georgia Supreme Court reviews each death sentence with other factually similar murder cases to determine whether the sentence

imposed in the case under review is excessive, the South Carolina Supreme Court excludes from its consideration all murder cases--however numerous they might be--in which death was not imposed, and thus provides a form of proportionality review which is almost entirely subjective in nature, and which cannot by its very structure reveal whether the death sentence under review is in fact "substantially disproportionate to the penalties that have been imposed under similar circumstances." Zant v. Stephens, ___ U.S. ___, 103 S.Ct. at 2750. Accordingly, it is petitioner's submission that the South Carolina Supreme Court's construction of its own sentence review function, as explicated in Copeland and applied in his case, has rendered South Carolina's sentencing scheme constitutionally indistinguishable from that struck down in Furman.

This conclusion is reinforced by another aspect of South Carolina's sentencing system involved in this case, which is the extremely broad definition of the statutory aggravating circumstance of kidnapping. The statutory definition of kidnapping read to the jury in this case required no more than a finding that the defendant "unlawfully seized" the victim. Tr. 1204.[7] This factual circumstance was then resubmitted to the jury at petitioner's sentencing hearing, without any narrowing instruction, as a legally sufficient basis upon which to impose the penalty of death. Tr. 1294-1303. Since this aggravating factor is obviously present in virtually every murder case where the victim is not killed from ambush or otherwise surprised and killed virtually

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[7]The full statutory definition read to the jury from S.C. Code §16-3-910 (1982 Cum. Supp.) was the following:

> Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away without the authority of law... except when a minor is seized or taken by a parent thereof, shall be guilty of the statutory offense of kidnapping.

Tr. 1204. It will be noted that the use of the disjunctive in this definition permitted the jury to find the defendant guilty of kidnapping upon no more than a finding that the victim had been seized, which is to say that he had been accosted, and his right to walk away restrained. Terry v. Ohio, 392 U.S. 1, 16 (1968).

instantaneously, it can readily be seen that the kidnapping aggravating circumstance of S.C. Code §16-3-20(C)(a)(1)(c) cannot be said to adequately differentiate this or any other murder case "in an objective, even-handed and rational way from the many [South Carolina] murder cases in which the death penalty may not be imposed." Zant v. Stephens, ___ U.S. ___, 103 S.Ct. at 2744 (1983).[8]

The significance of this definitional overbreadth to the issue here is that where a statute both entrusts to the jury the unfettered discretion to impose death once a single aggravating circumstance is found, and also defines one of its aggravating circumstances so broadly as to render virtually any murder case potentially punishable by death, meaningful appellate review of the proportionality of each death sentence imposed remains as the only method for "minimiz[ing] the risk of wholly arbitrary and capricious action" in the selection of those persons who are to be executed. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell and Stevens, JJ). Absent such meaningful review, which must necessarily include comparative consideration of those murder cases where death was not imposed as well as those cases where it was imposed, there is simply no substantial difference between the South Carolina capital sentencing statutes struck down in the wake of Furman v. Georgia, Atkinson v. South Carolina, 408 U.S. 936 (1972) (per curiam) (rev'g 253 S.C. 531, 172 S.E.2d 111), Fuller v. South Carolina, 408 U.S. 937 (1972) (per curiam) (rev'g 254 S.C. 260, 174 S.E.2d 774), and the statute under which petitioner has been sentenced to die.

For the foregoing reasons, petitioner requests that the Court grant his petition and consider his case along with Pulley v. Harris, No. 82-1095.

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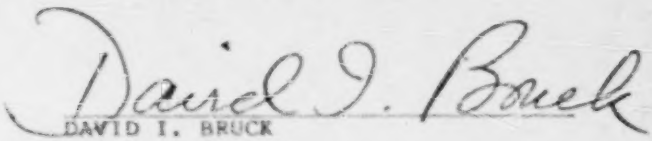
[8]The South Carolina Supreme Court had previously upheld this statutory aggravating circumstance against Eighth Amendment attack on grounds of overbreadth, State v. Copeland, ___ S.C. ___, 300 S.E.2d 63 (1982), State v. Koon, ___ S.C. ___, 298 S.E.2d 769, 774 (1982), and petitioner was denied leave of the state court to renew this argument during his own appeal. See Petition to Argue for Overruling or Modification of Precedent, infra at A-15-16.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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ATTORNEY FOR THE PETITIONER

October 3, 1983.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Sylvester Lewis Adams, ... Appellant.

Appeal From York County
Robert L. McFadden, Judge

Opinion No. 21942
Filed June 29, 1983

AFFIRMED

David I. Bruck, of S. C. Commission of Appellate Defense, of Columbia; James W. Boyd, of York; and Samuel B. Fewell, Jr., of Rock Hill, for appellant.

Attorney General T. Travis Medlock, Retired Attorney General Daniel R. McLeod and Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor William L. Ferguson, of York, for respondent.

LITTLEJOHN, A. J.: This is an appeal from a criminal conviction on the charges of murder, kidnapping and housebreaking. The Appellant, Sylvester Lewis Adams (Adams), was sentenced to death. We affirm.

This case was tried previously. Upon appeal, a new trial was granted. See, State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981).

On October 17, 1979, at approximately 3:00 p.m., Bryan Chambers, a sixteen year old with a slight learning disability, was taken from his home and strangled to death in a wooded area directly behind the house. Shortly thereafter, Bryan's mother received a phone call. The only words she could make out were "boy . . . place . . . money . . . ." Bryan's mother hung up on the caller not knowing at that time that her son was missing.

The evidence introduced at the trial relating to the abduction is as follows:

1) Forced entry into the house through the rear door with the use of a tire tool (or jack handle).

2) A piece of tablecloth was torn from the dining room table and used to hold a sock in the victim's mouth.

3) Venetian blind cord, removed from the house, was used to bind his feet once he had been forced into the wooded area behind the house.

4) The strangulation was caused by placing a stick in the tablecloth (pulled down around his neck) and tightening it in the fashion of a tourniquet.

5) A butcher knife was missing from the victim's home and there was a deep cut above one of his ears consistent with a blow from such a knife.

James Jeter was a key state's witness. His testimony may be abbreviated as follows: The defendant (Adams) rode a bicycle into Jeter's backyard where he was raking leaves. Adams had a tire tool, a gun and a pair of gloves in his possession. Adams told Jeter he was going to break into the house next door to steal money.

After entering the house, Adams attempted to solicit Jeter's aid in removing a safe he had allegedly found there. Jeter refused. Adams then stated he would await Bryan's return home from school to get the combination.

Jeter spoke with Bryan in Bryan's front yard when he returned home a few minutes later. He did not warn Bryan that Adams was inside because he was afraid.

A short time later, Jeter saw Adams lead Bryan into the woods with something white tied around Bryan's neck. He appeared to be resisting Adams.

A search for Bryan was conducted by Jeter's father and Bryan's father (A. C. Mitchell) in the early evening. Jeter became concerned about his friend and asked Adams where he was. Adams told him Bryan was tied up in an abandoned house and he would be released when Bryan's parents gave him (Adams) some money. He also told Jeter he had attempted a ransom call but Bryan's mother had hung up on him before he could tell her where to deliver the money.

Bryan's body was found covered with brush by rescue workers the following day. The next day (two days after the killing), Jeter told the police for the first time what he knew about the incident.

A. C. Mitchell testified that on the evening of his son's death, when he and a neighbor were searching for Bryan with the aid of Bryan's small dog (which had been found trapped inside the washing machine of the boy's home), Adams had frightened them away from the area where Bryan's body was later found by appearing with his pit bulldog allegedly to aid in the search.

Adams raised seven (7) issues for review by this Court. We hold that none assert reversible error.

I.

Did the trial judge err in admitting for the jury's consideration exhibit identification tags which included written statements of police officers concerning issues of fact?

The following items were introduced into evidence by the prosecution and taken to the jury room during deliberations with identification tags prepared by the police attached:

(a) State's Exhibit No. 15,
Jack handle or tire tool;

(b) State's Exhibit No. 4,
Venetian blind cord container;

(c) State's Exhibit No. 16,
Photograph of the backdoor of the victim's home; and

(d) State's Exhibit No. 2,
Piece of torn table cloth.

When these exhibits were offered, counsel for Adams announced, "no objection" to Exhibit No. 16, and Exhibit No. 2. Objection to the introduction of Exhibit No. 15, jack handle, was solely on the ground that "one jack handle looks like another." Objection to Exhibit No. 4, venetian blind cord container, was solely on the ground that it had not been properly "linked up." Adams now argues that the information on the identification tags, when read together, presented to the jury a summary of the prosecution's theory of the case and impermissibly bolstered the credibility of the State's key witness. Normally, these objections would not be considered upon appeal, but inasmuch as this is a capital case, we accept all argument in favorem vitae, State v. Adams, supra.

The information on the identification tags was basically the same information to which the witnesses testified. Adams' own statement corroborates each tag. We hold that the tags were merely cumulative of testimony and other evidence introduced at trial and assert no error. See generally, State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978), and State v. Funderburke, 251 S.C. 536, 164 S.E.2d 309 (1968).

II.

Did the trial judge err in admitting Adams' confession into evidence as violative of his Fifth and Sixth Amendment constitutional rights?

At trial, the State offered, and the trial judge admitted, a written confession signed by Adams four days after his arrest. The confession was corroborative of, and certainly not inconsistent with, other evidence pointing conclusively to the guilt of the accused.

At an appropriate time, the judge held an in camera hearing and found beyond a reasonable doubt that Adams was given his Miranda rights, understood the rights, and that the statement was freely and voluntarily given and signed. Since there was conflicting evidence as to the validity of the confession, the trial judge, in the last analysis, submitted the issue to the jury. The same objection was interposed at the first trial of the case. Upon appeal, this Court declined to invalidate the confession, stating the following:

> We caution the court on remand to impress upon the jury that no confession may be considered by it unless found beyond reasonable doubt to have been given freely and

> voluntarily under the totality of the circumstances. State v. Harris, 212 S.C. 124, 46 S.E.2d 682 (1948), rev'd on other grounds, 388 U.S. 68, 69 S.Ct. 1354, 93 L.Ed. 1915 (1949). In addition, since the appellant was in custody at the time of his alleged confession, the jury must be convinced that he received and understood his Fifth and Sixth Amendment rights, as mandated by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). See State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979), cert. denied 444 U.S. 1048, 100 S.Ct. 739, 62 L.Ed.2d 735 (1980).

Upon the second trial now here for review, the judge followed these instructions, telling the jury:

> Mr. Foreman and ladies and gentlemen of the jury, I would instruct that before you may consider in evidence the statement or confession that was put into evidence, you must be convinced beyond a reasonable doubt that the defendant was advised of his right to remain silent, advised that anything he said could be used in evidence against him, that he had a right to counsel, that if he could not afford counsel that one would be provided him without charge. If the defendant was so advised, you may only consider his admission if you find that he fully understood the warnings and nevertheless intelligently and knowingly elected to waive his rights.
>
> . . . . . .
>
> And so I'll instruct you, Mr. Foreman and ladies and gentlemen of the jury, that you must find that the defendant was advised of his rights, which I referred to, and knowingly understood them, and you must find that he was so advised and that the State has proved that he was given those rights, that he understood them. You must be convinced of that beyond a reasonable doubt. And you the jury must additionally, before you would consider that statement or confession, find beyond a reasonable doubt that the same was given freely and voluntarily under the totality of the circumstances.

When the evidence relative to violation of constitutional rights is conflicting, someone has to determine the issue of admissibility. This factual matter is first for determination by the trial judge; in the last analysis, it is for determination by the jury. While either the trial judge or the jury might have made this determination differently, the evidence does not warrant the conclusion as argued by counsel for Adams that the confession should have been excluded as a matter of law. It is clearly inferable that Adams persisted in signing the confession, ignoring the admonition of his counsel.

A recitation of the details leading up to the confession would serve no purpose. Suffice it to say the evidence was in conflict and the trial judge

properly admitted the same in evidence. Having properly been admitted in evidence at the guilt or innocence stage, the confession was properly before the jury at the sentencing phase of the bifurcated trial.

III.

Did the trial judge err in overruling Appellant's challenge for cause of a juror who stated that he would likely believe a police officer's testimony before that of a private citizen?

During the voir dire examination of a juror, the following exchange took place:

> [By Defense Counsel:] Q. Would you believe a police officer's testimony before that of a private citizen?
>
> A. Yes, sir.
>
> Q. You think a police officer's testimony is more reliable?
>
> A. I would think so.

Adams' attorneys made a motion that this juror be struck for cause. The motion was overruled.

"The relative competency of a prospective juror to be empaneled for a specific trial is a matter addressed to the sound discretion of the trial judge whose decision will not be disturbed unless wholly unsupported by the evidence." State v. Gilbert, 277 S.C. 53, 283 S.E.2d 179, 180 (1981), and cases cited therein.

In this instance, the trial judge made further inquiries of the prospective juror and received an affirmative response that he would make a determination of guilt or innocence "based upon the evidence and instruction of the law . . . ." Thus, there is support in the record for the trial judge's ruling and no abuse of discretion appears.

It is the further holding of this Court that the subject matter of this question is improper under voir dire examination as permitted by the Code of Laws of South Carolina (1976), as amended, § 16-3-20(D). It calls upon the juror to make a determination in his own mind as to whether one class of persons is more credible than another.

A juror should not, prior to trial, be required to assert which witnesses he will believe nor what type of witness he will believe. This is true because a juror should believe those witnesses whose credibility appeal to him after he has heard all of the testimony. The question invades the province of the jury to determine individual credibility in the context of the entire case. Cf. Cox v. State, 285 S.E.2d 687 (Ga. 1982).

IV.

Did the trial judge err in allowing the case to proceed to trial after having Adams briefly examined by a psychiatrist who reported that he was competent?

In December and January of 1980, Adams underwent an extensive psychiatric evaluation at the South Carolina State Hospital for the purpose of determining his competency to stand trial. He was found competent.

Adams was subsequently convicted and sentenced to death. Nearly two years passed before he was granted a new trial. Following reversal of his conviction by this Court, pre-trial motions came to be heard in the York County Court of General Sessions. The solicitor believed that a reevaluation of Adams' competency was mandated and so moved the court. Defense counsel opposed this motion on the grounds that Adams himself was opposed to it and it might interfere with pretrial preparation.

The trial court, out of an abundance of caution, granted the Solicitor's motion on the condition that the evaluation be performed locally.[1] Adams was examined in his cell for about twenty minutes by the same psychiatrist who had examined him nearly two years earlier. The psychiatrist stated that in his opinion, Adams was competent to stand trial.

South Carolina Code §44-23-410 (1976), relating to when and how a defendant must be given a psychiatric evaluation is discretionary with the trial judge. State v. Bradshaw, 269 S.C. 642, 239 S.E.2d 652 (1977). See also, State v. Drayton, 270 S.C. 382, 243 S.E.2d 458 (1978).

The statute mandates such an examination, "Whenever a judge of the circuit court . . . has reason to believe that a person on trial before him, charged with the commission of a criminal offense, is not fit to stand trial because such person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity . . . ." Thus, there was no requirement that Adams be reevaluated absent a finding by the trial judge of its necessity.

As was his right, Adams chose to participate in his own defense. On appeal, he now argues that certain statements he made during the trial indicate he was mentally incompetent to understand the proceedings against him or to assist in his own defense.

---

[1] The trial judge made these comments in ruling on the State's motion. "Well, this is a death penalty case and if there is an appeal of any sort, they will look at every small, minute thing and I don't think he can waive anything. All I want is for the rules to be followed, and I don't know if he can waive it. If he can waive it, fine. All I'm trying to do is [make] sure that everything is done."

While it is true that Adams made several statements which could be considered damaging and which a more sophisticated person would not have made, it cannot be said that these statements rise to a level of suggesting mental incompetency and requiring reversal. The record is replete with instances where Adams exhibited a clear understanding of the proceedings and actively and competently aided his defense. We, therefore, hold that this exception is without merit.

V.

Were the trial court's instructions during the sentencing phase of the trial adequate?

Next, Appellant Adams raises two questions concerning the adequacy of the trial judge's instructions to the jury during the sentencing phase of the trial. First, he alleges the trial judge erred in responding to a juror's question as to whether Adams' confession was a mitigating circumstance. Second, he alleges the trial judge erred in instructing the jurors that they were not required to individually state the basis for their sentencing decision.

In the initial charge, the trial judge instructed the jury that they were to consider any statutory aggravating and mitigating circumstances supported by the evidence and "any mitigating circumstances otherwise authorized or allowed by law. . . ."

The trial judge further elaborated and stated:

> While it is necessary for you to find beyond a reasonable doubt the existence of at least one alleged statutory aggravating circumstance before you can recommend that the Defendant be sentenced to death, it is not required that you find beyond a reasonable doubt the existence of at least one alleged statutory mitigating circumstance in order to recommend that the Defendant be given life imprisonment. As a matter of fact, you may recommend that the Defendant receive a life sentence irrespective of whether you find the existence in the evidence of an alleged statutory mitigating circumstance or not. But where you consider an alleged statutory mitigating circumstance, it is proper for you to consider only a statutory mitigating circumstance that is supported by the evidence. As I say, you may recommend a life sentence without finding the existence of an alleged statutory mitigating circumstance and you, as I have told you before, may recommend the imposition of the life sentence even should you find beyond a reasonable doubt the existence of an alleged statutory aggravating circumstance. In other words, you may in your good judgment, recommend a life sentence for any reason at all that you see fit to consider.

When the jury later returned to the courtroom to ask "does the confession constitute a mitigating circumstance to the crime", the trial judge

advised, "it is not a statutory mitigating circumstance, but as I have also instructed you, you may consider the case in its entirety for your consideration." The foreman of the jury stated that the question had been answered.

It must be noted that the question put to the trial judge by the jury was not a question of law but a question of fact. It was, therefore, peculiarly within the province of the jury to make this determination. The trial judge's response to this question was both proper and adequate as a matter of law.

The jury also requested further instruction as to whether "they [would] each have to state individually why they have reached their own particular opinion, either life or death."

The trial judge first responded that each juror must find at least one of the aggravating circumstances in order to recommend the imposition of the death penalty, but that no stated finding was necessary to recommend to the court a life sentence. Apparently, there was further confusion on the part of the jurors as to whether it would be necessary for each juror to stand individually and verbally state their reasons for recommending either sentence.

The following colloquy took place:

JUROR: You still didn't glearly state if we had to stand down and say it, why---

THE COURT: You don't---

JUROR: ---by curself.

THE COURT: You don't have---you do not -- it would be my understanding of the law that you can make your own individual determinations. You do not have to find a statutory mitigating circumstance and put it down on paper.

JUROR: I mean---what we're talking about, if---do we have to stand up and say why do we feel that this defendant---

THE COURT: No -- you, you can deliberate and cast your own vote in the matter. It's not necessary that you -- that the jury come to a conclusion or an individual juror state a finding. Does that answer the question?

JUROR: So, we verbally don't have to stand up and say---

THE COURT: Don't, don't proceed on that. If I've answered the question, do not proceed to comment.

FOREMAN: Yes, Your Honor, you've answered the question.

Adams contends that this instruction may have inferred to the jurors that they could recommend the death penalty for any reason so long as they found a statutory aggravating circumstance. This argument is not substantiated by the record.

A supplemental jury instruction must be considered as a whole. State v. Pulley, 216 S.C. 552, 59 S.E.2d 155 (1950). Adams concedes that if the jury simply wished to know whether they must individually, verbally state the basis of their verdict, then the instruction was proper. Viewing the juror's question and supplemental instruction as a whole, we find that this is the only reasonable interpretation it can be given and thus there was no error. We so hold.

VI.

Adams also alleged as error that the jury verdict form failed to indicate that the statutory aggravating circumstances were found "beyond a reasonable doubt". This argument is without merit. The judge's initial instructions stated that any aggravating circumstance must be found beyond a reasonable doubt and be the basis for the jury's recommendation of death if that sentence were recommended. We hold that this instruction was adequate and that there is no requirement that the verdict form indicate the standard of proof upon which the verdict is based.

Adams' remaining argument, raised for the first time at oral argument, that the prosecution's closing argument impermissibly invaded the province of the jury is equally without merit.

Adams raised several other issues by exception which were neither argued nor briefed. Ordinarily, these exceptions would be deemed abandoned. However, in keeping with our principle of examining death penalty cases in favorem vitae, we have scrupulously examined these exceptions and find them to be without merit.

Pursuant to § 16-3-25(C), Code of Laws of South Carolina (Cum. Supp. 1978), it is the duty of this Court to review the record and determine with regard to the sentence imposed:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 16-3-20, and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Upon review of the record, we concur with the ruling of the trial court that ". . . prior to the imposition of the death sentence upon the Defendant,

Sylvester Lewis Adams, I find as an affirmative fact that the evidence of the case warrants the imposition of the death penalty and that its imposition is not a result of prejudice, passion, or any other arbitrary factor."

Adams has presented no argument that the death sentence was imposed in violation of this requirement and we find none.

We further find that the evidence presented overwhelmingly supports the jury's finding beyond a reasonable doubt that the statutory aggravating circumstances of kidnapping and housebreaking were present as enumerated in S. C. Code Ann. § 16-3-20 (Cum. Supp. 1978).

Evidence presented by James Jeter, the victim's mother, and Adams' confession all support the findings that Bryan Chambers was kidnapped for the purpose of extorting money from his parents. The evidence further supports a finding that the murder was committed while in commission of the crime of kidnapping. Incident to the kidnapping and murder, Adams committed the crime of housebreaking, which occurred in close proximity of both time and place to the commission of the murder.

We have further examined and researched past death penalty cases in this state tried under the current statute in an attempt to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. S. C. Code Ann. §16-3-25(C)(3), supra.

Cases tried in this state under the death penalty statute resulting in capital punishment heretofore, involved factual situations and accused persons similarly atrocious to those involved in this case. It is our observation that a unanimous jury in South Carolina has ordered the death penalty in only those cases where the proof of facts is virtually undebatable and the nature of the wrongful killing is such as to shake the conscience of the community. The facts are not the same in any two cases and, accordingly, our review of the facts relate largely to degree of culpability of the defendant and the viciousness of the killing. In the case at hand, there is no semblance of an excuse for the wrongful killing, nor does the record reveal any facts relative to the accused person himself that would warrant leniency. Our comparison includes: State v. Yates, ____ S.C. ____, ____ S.E.2d ____ ( ), State v. Gilbert, 277 S.C. 53, 283 S.E.2d 179, Cert. den. 102 S.Ct. 2258, State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, cert. denied, 444 U.S. 957, 100 S.Ct. 437, 62 L.Ed.2d 329, Roach v. South Carolina, 444 U.S. 1026, 100 S.Ct. 690, 62 L.Ed.2d 660, State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981), ____ S.C. ____, 299 S.E.2d 317 (1982), and State v. Thompson, 278 S.C. 1, 292 S.E.2d 581, cert. denied, 102 S.Ct. 2917.

The defendant in this case was a twenty-three year old man. His participation in the trial of the case, including his questioning of witnesses, indicates intelligence beyond question. He broke into the residence of his victim through force, lay in wait for his victim's arrival, took him from his home, strangled him to death, and hid his body under brush--all for the purpose of attempting to extort money from the victim's parents. It would be difficult to conceive of a crime more heinous. We find that the penalty imposed is not

disproportionate to the penalty imposed in other cases under the comparatively new death penalty statute. The jury had ample opportunity to weigh all of the evidence as might relate to mitigating circumstances and found none offsetting the aggravating circumstances. We agree.

All issues have been considered, even if not argued. In addition, we have searched the entire record to ascertain if there has been committed reversible error; we find none. The convictions and sentence of the Appellant, Sylvester Lewis Adams, are, accordingly,

AFFIRMED.

LEWIS, C.J., NESS, GREGORY and HARWELL, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

Honorable Robert L. McFadden, Judge

THE STATE,

RESPONDENT,

v.

SYLVESTER LEWIS ADAMS,

APPELLANT.

PETITION TO ARGUE FOR OVERRULING
OR MODIFICATION OF PRECEDENT

Counsel for appellant Sylvester Lewis Adams, who is appealing his conviction for murder and sentence of death, hereby requests permission, pursuant to Supreme Court Rule 8, §10 and to the decision of the United States Supreme Court in Engle v. Isaac, ___ U.S. ___, 102 S.Ct. 1558, 1572-3 (1982), to argue for overruling or modification of the following prior decisions of this Court:

I.

State v. Copeland, ___ S.C. ___, Opinion No. 21808 (filed November 10, 1982), and State v. Butler, ___ S.C. ___, 290 S.E.2d 1 (1982), to the extent that these decisions permit a jury to be instructed at the guilt or sentencing phase of a capital trial that the term "reasonable doubt" is synonomous with a "substantial doubt, a doubt for which you

can give a reason", and as "a serious or strong and well-founded doubt". Appellant seeks leave to argue that such instructions in his case violated the Due Process Clause of the Fourteenth Amendment, In re Winship, 397 U.S. 358 (1970), or in the alternative that they violated the Eighth and Fourteenth Amendments' requirement of special reliability in the process by which guilt or punishment are determined in a capital case. Beck v. Alabama, 447 U.S. 625 (1980); Woodson v. North Carolina, 428 U.S. 280 (1976); Butler v. South Carolina, ___ U.S. ___, 32 Cr.L. 4036, 4037 (Marshall, J., dissenting from denial of certiorari).

II.

State v. Thompson, ___ S.C. ___, 292 S.E.2d 581 (1982), to the extent that this decision upholds the constitutionality of S.C. Code §§16-3-20 et seq. despite these statutes' failure to require that the statutory aggravating circumstances be found by the sentencing authority to outweigh the mitigating circumstances beyond a reasonable doubt as a precondition for imposition of the death penalty. Appellant seeks leave to argue that the lack of guidelines for the weighing by the jury of aggravating against mitigating factors violates the Eighth Amendment's requirement of special reliability in the decision that death is the appropriate punishment in a particular case. Woodson v. North Carolina, 428 U.S. 280 (1976).

III.

State v. Copeland, ___ S.C. ___, Opinion No. 21808

(November 10, 1982), to the extent that this decision interprets both S.C. Code §16-3-25(C)(3) and the Eighth and Fourteenth Amendments as not requiring, in this Court's exercise of its comparative review of death sentences, that the death sentence under review be compared with other factually similar cases, regardless of whether or not the death penalty was imposed. Appellant seeks leave to argue that this Court's construction of its comparative sentence review function under S.C. Code §16-3-25(C)(3) renders §§16-3-20 et seq. violative of the Eighth Amendment's requirement that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869, 875 (1982), Furman v. Georgia, 408 U.S. 238 (1972).

IV.

State v. Copeland, ___ S.C. ___, Opinion No. 21808 (November 10, 1982), and State v. Adams, ___ S.C. ___, 283 S.E.2d 582, 587 (1981), to the extent that these decisions uphold the trial court's failure to instruct the jury at a capital sentencing proceeding concerning the actual legal consequences of an inability to reach a unanimous sentencing decision, and permits the trial judge to impose a requirement that the jury agree unanimously in order to return a recommendation of life imprisonment. Appellant seeks leave to argue that the concealment from and misrepresentation to his jury of the legal consequences of a failure to agree injected an arbitrary factor into the process by which he was sentenced to die, in violation of the Eighth Amendment.

V.

State v. Truesdale, ___ S.C. ___, Opinion No. 21799 (October 19, 1982), State v. Hyman, ___ S.C. ___, 281 S.E.2d 209 (1981), State v. Adams, ___ S.C. ___, 283 S.E.2d 582 (1981), and State v. Thompson, ___ S.C. ___, 292 S.E.2d 581 (1982), to the extent that these decisions uphold the legality and constitutionality of excluding jurors from service in either stage of a capital murder trial on the sole ground of their inability to impose a death sentence, and despite the provisions of South Carolina Code Section 16-3-20(F) and the Sixth Amendment's requirement of jury impartiality and representativeness. Appellant further seeks leave to argue for modification of State v. Truesdale, supra, to the extent that this decision precludes a capital defendant from presenting evidence to support the factual allegations which form the basis of his objections to exclusion of such jurors. Grigsby v. Mabry, 637 F.2d 523 (8th Cir. 1980).

VI.

State v. Copeland, ___ S.C. ___, Opinion No. 21808 (November 10, 1982), to the extent that this decision upholds against Eighth Amendment attack death sentences based at least in part upon a jury finding of "kidnapping". Because that offense is defined so broadly under South Carolina law as to apply to virtually every case of murder, appellant seeks leave to argue that the imposition of a death sentence on such a basis violated the requirements of the Eighth and Fourteenth Amendments that capital sentencing discretion be limited by clear and meaningful guidelines which serve to

distinguish the few murder cases in which death is imposed from the many in which it is not.

VII.

State v. Shaw, 273 S.C. 194, 255 S.E.2d 779 (1979), cert.den. 444 U.S. 957, to the extent that this decision upholds the constitutionality under the Eighth Amendment of electrocution as a method of execution.

WHEREFORE, having set forth his grounds, the undersigned counsel for the appellant requests that he be permitted to argue for overruling or modification of the decisions enumerated above.

Respectfully submitted,

David I. Bruck

DAVID I. BRUCK
Attorney for Appellant.

November 17, 1982.

The Supreme Court of South Carolina

FRANCES H. SMITH
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

December 8, 1982

David I. Bruck, Esquire
1401 Calhoun Street
Columbia, South Carolina 29201

Re: The State v. Adams

Dear Mr. Bruck:

The following Order was endorsed on your Petition to argue against precedent in the argument of the above matter:

"Petition denied.

/s/ J. Woodrow Lewis C.J.
For the Court

December 7, 1982."

Very truly yours,

Frances H. Smith
CLERK

/BS

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

August 3, 1983

David I. Bruck, Esquire
1401 Calhoun Street
Columbia, South Carolina 29201

Re: The State v. Sylvester Lewis Adams

Dear Mr. Bruce:

The Court has this day refused your Petition for Rehearing in the above case in the following order:

"Petition denied.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J. B. Ness A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

August 3, 1983."

The remittitur is being sent down today.

Very truly yours,

Clyde N. Davis, Jr.
CLERK

CND,Jr./drj

cc: The Honorable Harold M. Coombs, Jr.

S.C. Code §§16-3-20 et seq.

S.C. Code §16-3-20. Punishment for murder: spearate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years, notwithstanding any other provisions of law. Provided, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant and his counsel shall be permitted to present arguments for or against the sentence of death. The defendant and his counsel shall have the closing argument regarding the sentence imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:
(a) Aggravating circumstances:
(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;

(2) Murder was committed by a person with a prior record of conviction for murder;
(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;
(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
(b) Mitigating circumstances:
(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;
(3) The victim was a participant in the defendant's conduct or consented to the act;
(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;
(5) The defendant acted under duress or under the domination of another person;
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
(7) The age or mentality of the defendant at the time of the crime;
(8) The defendant was provoked by the victim into committing the murder;
(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant

found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

* * * * *

S.C. Code §16-3-25. Punishment for murder; review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:
(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in §16-3-20, and
(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:
(1) Affirm the sentence of death; or
(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of §16-3-20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any

evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-5547

SYLVESTER LEWIS ADAMS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioner, Sylvester Lewis Adams, respectfully moves this Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court. The affidavit of petitioner in support of this motion is attached hereto.

Presented herewith is a petition for writ of certiorari of the moving party.

Respectfully submitted,

David I. Bruck

DAVID I. BRUCK
1401 Calhoun Street
Columbia, S. C. 29201

Counsel for Petitioner.

October 3, 1983.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-5547

SYLVESTER LEWIS ADAMS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF SYLVESTER LEWIS ADAMS
IN SUPPORT OF MOTION TO PROCEED
IN FORMA PAUPERIS

I, Sylvester Lewis Adams being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. —

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1979 $700/month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. Allowance - $500/yr

3. Do you own any cash or checking or savings account? No.

a. If the answer is yes, state the total value of the items owned. —

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

a. If the answer is yes, describe the property and state its approximate value. —

5. List the persons who are dependent upon you for support and state your relationship to those persons.

— none —

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Sylvester Adams
Sylvester Lewis Adams

SWORN TO and subscribed before me
this 27th day of October, 1983.

David D. Brucks
Notary Public for South Carolina
My Commission Expires: 3/17/86.

Opposition

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-5547

SYLVESTER LEWIS ADAMS, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211

ATTORNEYS FOR RESPONDENT.

10

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY OF Brief in Opposition HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING 1 COPY IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID THIS 27th DAY OF October, 1983

Harold M. Coombs, Jr.
ATTORNEY FOR Respondent.

SWORN TO BEFORE ME THIS 27th DAY OF October, 1983

Karen Y. Newton (L.S.)
Notary Public for South Carolina

My Commission Expires 9-12-86

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. --

SYLVESTER LEWIS ADAMS, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211

ATTORNEYS FOR RESPONDENT.

QUESTIONS PRESENTED

I.

Should the Court grant the writ to determine the outer limits of the latitude permissible in state courts to devise jury instructions concerning rights guaranteed by the Fourteenth Amendment when at trial the Petitioner's present objection to the jury charge failed to specify a federal constitutional basis and merely excepted to a portion of the full charge in artificial isolation?

II.

Did the South Carolina Supreme Court in conducting a proportionality review--pursuant to South Carolina Code Section 16-3-25 (C) (3) (Cum. Supp. 1982) under the current death penalty statute involving cases of wrongful killing resulting in a sentence of death--violate the Eighth and Fourteenth Amendments or raise substantially the same question as that now being considered in Pulley v. Harris?

INDEX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No.

SYLVESTER LEWIS ADAMS, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Memorandum Opinion No. 21942, filed June 29, 1983, as reproduced in Petitioner's Appendix at pages A-1 through A-11.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I.

Should the Court grant the writ to determine the outer limits of the latitude permissible in state courts to devise jury instructions concerning rights guaranteed by the Fourteenth Amendment when at trial the Petitioner's present objection to the jury charge failed to specify a federal

constitutional basis and merely excepted to a portion of the full charge in artificial isolation?

II.

Did the South Carolina Supreme Court in conducting a proportionality review--pursuant to South Carolina Code Section 16-3-25 (C) (3) (Cum. Supp. 1982) under the current death penalty statute involving cases of wrongful killing resulting in a sentence of death--violate the Eighth and Fourteenth Amendments or raise substantially the same question as that now being considered in Pulley v. Harris?

ARGUMENT

I.

The trial court properly charged the jury concerning the State's burden of proof and reasonable doubt.

At the conclusion of the jury charge the Petitioner took exception "to the charge that a reasonable doubt is a substantial doubt. I think that substantial is a much stronger word that reasonable." (Tr. p. 1215, lines 8-10). The trial judge then agreed to issue a supplemental instruction and charged inter alia, "You can only find the defendant guilty if the State has proven all of the elements of the offense beyond a reasonable doubt." (Tr. p. 1216, lines 11-13). At the conclusion of the supplemental instruction, the Petitioner had no further additions or exceptions. (Tr. p. 1216, lines 7-23).

Since the Petitioner received in the trial court the only relief requested, there is no issue for this Court to resolve.

Moreover, the gist of Petitioner's complaint is that, viewed in artificial isolation, the trial judge's charge allegedly, erroneously equated "reasonable doubt" and "substantial doubt." However, an examination of the record completely refutes this contention.

In its main charge, the trial court charged the jury inter alia:

> The State does have the burden of proving the defendant guilty beyond a reasonable doubt on each indictment. I charge you that the defendant is entitled to any reasonable doubt arising in the whole case or arising on any defense that may have been set up by the defendant. If upon the whole case you have a reasonable doubt as to the guilt of the defendant, he's entitled to that doubt and would be entitled to an acquittal. Likewise, if you have a reasonable doubt as to whether or not the defendant has made out any of his defenses, then he would be entitled to that reasonable doubt, and would be entitled to an acquittal. Now I do not mean, ladies and gentlemen, by the term reasonable doubt that it is some whimsical of [sic] imaginary doubt. It is not a weak doubt, it is not a slight doubt. It is a substantial doubt, a doubt for which you can give a reason. It is a substantial doubt arising out of the testimony or lack of testimony in the case for which a person honestly seeking to find the truth can give a reason. If you have such a doubt in your mind as to whether or not

> the State has proven this defendant guilty, you should resolve that doubt in his favor and write a verdict of not guilty and acquit him. And, again, that same test and standard would apply as to each charge stated in the indictment. (Tr. p. 1199, line 12-p. 1200, line 9).

In the cases cited by Petitioner which reverse or disapprove reasonable doubt charges, the primary concern is that the charge may call upon the defendant to establish doubt and thereby lessen the State's burden of proof. Respondent submits that in the present case the trial court clearly charged the jury that the State had the burden of proving the Appellant guilty beyond a reasonable doubt. When considering a similar charge in State v. McAlister, 114 S.C. 402, 103 S.E. 772 (1920) the South Carolina Supreme Court concluded that a jury would not be mislead by the substitution of the word "strong" for the words "serious," "substantial," or "well-founded" when defining the term "reasonable doubt." The South Carolina Supreme Court reasoned that all of these words were "not [used] in the sense of 'powerful,' or 'overwhelming,' but simply in contradiction to the words 'flimsy,' 'fanciful,' or 'slight." McAlister, 114 S.C. at 405, 103 S.E.at 773. "It

is not error to equate substantial doubt with reasonable doubt." State v. Griffin, 277 S.C. 193, 198-199, 285 S.E.2d 631, 634 (1981). Reasonable doubt may be defined as a "substantial doubt, doubt for which you can give a reason." State v. Woomer, ___ S.C. ___, 299 S.E.2d 317 (1982). Reasonable doubt is "a doubt that is well-founded in reason" and "a substantial doubt." State v. Copeland, ___ S.C. ___, 300 S.E.2d 63 (1982). Consequently, the charge in question is in accord with the prior case law of South Carolina. Further, the South Carolina Supreme Court has held that such instructions are well within the acceptable guidelines set by this Court in In the Matter of Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L. Ed.2d 368 (1970). State v. Butler, 277 S.C. 452, 290 S.E.2d 1, 4 (1982).

"The purpose of a charge is to enlighten the jury." State v. Durant, 87 S.C. 532, 70 S.E. 306 (1911). An assignment of error which is predicated upon isolated excerpts, which standing alone might be misleading, fails if the instructions as a whole are free from error. State v. Daniels, 231 S.C. 176, 97 S.E.2d 902 (1957). The Respondent respectfully submits that the trial court accurately instructed the jury concerning reasonable doubt, and the Petitioner's contention that he was prejudiced by this charge is without merit, unsupported by the record, and not preserved for review by this Court.

ARGUMENT II.

The statutory comparative review of the Petitioner's death sentence by the South Carolina Supreme Court pursuant to South Carolina Code Section 16-3-25 (C) (3) (Cum. Supp. 1982) was not violative of the Eighth and Fourteenth Amendments because the South Carolina Supreme Court considers "similar cases" to be only cases in which an actual conviction and sentence of death has been rendered by a trier of fact.

In determining pursuant to South Carolina Code Section 16-3-25 (C) (3) that the death penalty was not disproportionate to the penalty imposed in other similar cases, the South Carolina Supreme Court compared the instant case with other cases in which an actual conviction and sentence of death had been rendered by a trier of fact under the new death penalty statute. (Petitioner's Appendix A-10 - A-11).

The South Carolina Supreme Court has exhaustively examined and rejected the merits of Petitioner's contention in State v. Copeland, et al., ___ S.C. ___, 300 S.E.2d 63 (1982).

> Imposition upon the states of a single design for proportionality review would represent a massive intrusion upon the integrity of state governments within the federal scheme. We cannot assume that the United States Supreme Court would take such a step by mere implication or inadvertence.... Neither formal announcement nor suggestive precedent

> reveals itself in any of the post-Furman decisions. The due process clause of the Fourteenth Amendment to the U.S. Constitution does not even require states to provide appellate review [citations omitted].... We find no suggestion that, where state appellate review is granted, the U.S. Supreme Court has mandated any particular mode of conduct, to say less of ruling any mode unconstitutional.... [T]he contours of proportionality review, where it exists, have been left to state determination since the U.S. Supreme Court has declined to impose any specific model of review upon the states. §16-3-25 (C) of the Code represents an act of legislative grace by the General Assembly which we are required to interpret in accordance with sound rules of statutory construction. In our view, the search for "similar cases" can only begin with an actual conviction and sentence of death rendered by a trier of fact in accordance with §16-3-20 of the Code.... This Court would enter a realm of pure conjecture if it attempted to compare and contrast [cases which include sentences of life imprisonment, acquittals, reversals and even mere indictments and arrests] with an actual sentence of death. Id.

The South Carolina Supreme Court's statutorily mandated proportionality review and determination that Petitioner's sentence of death was not disproportionate leaves this Court with no meritorious constitutional issue to decide in this question.

Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982) stands for the position of one Federal Circuit Court of Appeals that proportionality review is required to determine if the

penalty in a given case is proportionate to other sentences for similar crimes in order to prevent the arbitrary and capricious application of the penalty. But nothing in Harris suggests that any type of proportionality review pursuant to any kind of guidelines is required from among any set(s) of similar crimes. Harris v. Pulley is entirely inapposite to Petitioner's claim that the South Carolina Supreme Court erred in failing to use life imprisonment cases as part of the pool of similar cases for proportionality review. Since in the present case the Petitioner received a judicial review of the proportionality of his sentence, there is no merit in Petitioner's contention that the instant Petitioner raises substantially the same question being considered by this Court in Harris v. Pulley.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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